No. 12759

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. P. BARBACHANO, *et al.*,

Appellants,

vs.

LAWRENCE W. ALLEN, *et al.*,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

I.

Statement of the Issues Involved in This Appeal.

Appellants have taken this appeal upon two points of law. Only one of these points was raised in or ruled upon by the court below, presided over by Judge Westover. Under long recognized rules, a question of law which was not presented to nor passed upon by the trial court cannot be raised for the first time upon appeal.

(1) The first point, and we believe the only point properly raised upon this appeal, is appellants' contention that where damages have been awarded to them as the plaintiffs in an action for damages for fraud, a subsequent discharge in bankruptcy of defendant Willis Allen will not release the bankrupt from the debt.

(2) The second point presents a question not presented in the trial court and which is now raised for the first time on this appeal. Appellants having lost in the court below on the first point, now come to this court with a warming over of their arguments on the first point and the following new contention: That in the $86,554.41

judgment awarded to plaintiffs against the defendants for damages for fraud there is included the sum of $15,150 damages for wilful and malicious injuries to person or property and that therefore the discharge in bankruptcy did not release the bankrupt from such portion of the judgment.

II.

Summary of Argument.

(1) On the first point, the court below sustained the contention of defendant Willis Allen that his discharge in bankruptcy released him from the debt of the judgment even though the judgment was for damages for fraud. The ruling was based upon the court's finding that neither the defendant Willis Allen nor any of the defendants ever obtained any money or property from the plaintiffs. Plaintiffs admitted that the defendants never obtained money or property from the plaintiffs but contended that plaintiffs had invested money and property in a common enterprise controlled by defendants and intended for the mutual benefit of plaintiffs and defendants thus constituting the plaintiffs and defendants partners or joint adventurers. In answer to this contention, the court below found that the facts did not support such claim. Among the facts disclosed by the entire record in the case it was pointed out to the appellants by both the court and opposing counsel that:

(a) the record showed clearly that neither the bankrupt nor any of the defendants had ever received any money or property, either real or personal, from the plaintiffs;

(b) that all of the expenditures made by the plaintiffs had been made for the improvement of their own prop-

erty and on plaintiffs' own behalf and for plaintiffs' own benefit;

(c) that Willis Allen or none of the defendants had ever received any benefit directly or indirectly or the use of any expenditure made by the plaintiffs;

(d) that the plaintiffs made no transfer of money or property to anyone at defendants' request with the exception of the $1700 paid to the Mexican government for the issuance of the radio station concession to M. P. Barbachano, and that this $1700 was paid by plaintiffs with money furnished to the plaintiffs by the defendants for that purpose;

(e) that plaintiffs assumed no obligations to the Mexican government or otherwise to build the radio station prior to the time the plaintiffs rescinded their contract with the defendants; that plaintiffs assumed the obligation to the Mexican government to build the radio station by depositing a bond with that government on Oct. 5, 1936, and on that same day served notice on defendants of rescission of their contract. [Tr., top and bottom of p. 68.] That any and all expenditures of plaintiffs in regard to the construction of the radio station were for plaintiffs' own account and not for the benefit of the defendants, and were of plaintiffs' own volition;

(f) that the defendants never exercised, and were never permitted by the plaintiffs to exercise, any control over any money or property belonging to any of the plaintiffs, nor did anyone else do so because of any request of the defendants upon the plaintiffs;

(g) it was clear that defendants had no control or ownership in the radio station constructed by the plaintiffs because the record showed that plaintiff M. P. Barbachano as owner of the concession, radio station and ap-

purtenances transferred the same to a Mexican Corporation in consideration of the issuance to him of all of the capital stock of the corporation [Tr., last par. on p. 70 and first five lines on p. 71];

(h) said corporation was not the corporation called for in the contract between plaintiffs and defendants. [Tr., p. 24, par. 9.]

(2) On the second point in appellants' argument, raised here for the first time, namely appellants' contention that a portion of plaintiffs' judgment against defendants was for wilful and malicious injuries to person or property and therefore was not released by the discharge in bankruptcy, it should be sufficient answer to call to this Court's attention the long established rule of this Court that it will review only those rulings made by the trial court on questions brought to its attention and passed upon by it.

Appellants made no contention in the court below that the discharge in bankruptcy of defendant Willis Allen did not release him from the obligation of the judgment because a portion of the total amount of the judgment was for wilful and malicious injuries to person or property. Such claim now made on appeal for the first time, is pure afterthought.

For appellants to raise such a question on appeal for the first time is unfair to appellees; it deprives them of the opportunity of referring to portions of the record not included in the transcript. Also it deprives appellees of the opportunity to introduce extrinsic evidence in accordance with the rule permitting such evidence as laid down in *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d 127, 177 P. 2d 364.

For the appellants to raise for the first time on appeal a question of law or fact not presented to nor passed upon

by the trial court is not only unfair to the appellees, but also it is unfair to the appellate court and to the trial court, for obvious reasons.

But wholly aside from the foregoing considerations, appellants' new point has no merit. A close inspection of the Transcript shows clearly that the $15,150 portion of the judgment which appellants now belatedly claim was an award for slander of title, is not that at all, but actually is instead a carefully and meticulously calculated award of damages for loss of radio station advertising time. [Tr., last par. on p. 74 extending down to the middle of p. 75; and also p. 87 last line thereof.]

And the $10,000 portion of the judgment which appellants now claim to be an award for injury to personal property, to-wit, to the radio station equipment which was said to be wrongfully attached, upon closer inspection turns out to be merely an award of special damages awarded to plaintiffs, not to compensate them as claimed for wilful and malicious injury to the radio equipment which was attached, but instead was to compensate plaintiffs for "a loss in the additional sum of $10,000 expended by the latter, as aforementioned, in order to procure the reinstatement of said concession after the Mexican government had declared the same to have become void and terminated;" . . . because of delay in station construction occasioned by the attachment. There was no actual injury to the attached radio equipment, nor was there any allowance of damages therefor. [Tr., p. 76, first par. commencing on that page.] [Also Tr., p. 84, first 12 lines.]

Neither of the foregoing portions of the damages awarded to appellants come within the exceptions specified by the statute, and hence were released by the discharge in bankruptcy. (11 U. S. C. A. 35, Ch. III, Sec. 17.)

III.
ARGUMENT.

(1) Fraud.

"Fraud" is a harsh word, and it is only fair, in justice to the Appellees, to note that an examination of even the small portion of the record appearing in the Transcript discloses that the defendants never obtained money or property from the plaintiffs by false pretenses or false representations, or at all.

The supposed fraud consisted in alleged representations as to the financial ability of the defendants to carry out the contract to erect and operate a radio station in Mexico. The record discloses that there was no false written financial statement; the only proof was the word of one witness against another as to what was said about defendants' financial ability prior to the entry into the contract. The adverse decision is one about which volumes could be written—but not here.

Appellants' brief labors to create the impression that appellees benefited from the expenditures made by the appellants, even though it is reluctantly admitted that appellees obtained no money or property from the appellants.

However, after spending some considerable time in an examination of the files and records in the case, and after listening to the arguments of counsel for both sides, the court below in ruling against appellants on the motion, pointed out to the appellants the reasons for his ruling. Among those reasons were the following:

(a) neither the bankrupt Willis Allen nor any of the defendants had ever received any money or property from the plaintiffs;

(b) all of the expenditures made by the plaintiffs had been made for the improvement of their own property, for their own benefit, and of their own volition;

(c) that Willis Allen or none of the defendants had directly or indirectly received any benefit or use of any expenditures made by the plaintiffs;

(d) that none of plaintiffs' expenditures had been made at the request of the defendants either on behalf of the defendants or on behalf of any other person;

(e) that the plaintiffs had made no transfer of money or property to anyone at defendants' request with the exception of the $1700 paid to the Mexican government for the issuance of the radio station concession to Manuel P. Barbachano, and that this $1700 was paid by plaintiffs with money furnished to the plaintiffs by the defendants;

(f) that the plaintiffs were not compelled to build the radio station merely because the defendants breached their agreement to construct it;

(g) that the plaintiffs were never bound to the Mexican government to erect the radio station in accordance with the concession until such time as the plaintiffs posted bonds therefor with the Mexican government, and that at the time of the posting of such bonds by the plaintiffs, the plaintiffs knew of their own intention to rescind their contract with the defendants on that very same day on which the bonds were posted. In addition, plaintiffs knew at the time they posted the bonds that the defendants had declined to post them; that therefore the enterprise which the plaintiffs undertook, to build the radio station, was entirely on their own account and for plaintiffs' sole benefit; that the enterprise was not a partnership affair and that the plaintiffs and defendants were not joint adventurers;

(h) that the defendants were never permitted to exercise any control over any money or property belonging to any of the plaintiffs; nor did any other person exercise any such control because of any request by the defendants upon the plaintiffs;

(i) that the defendants never had any control, possession or ownership in the radio station is evidenced by the record which shows that plaintiff M. P. Barbachano as owner of the concession and radio station and appurtenances transferred the same to a Mexican corporation in consideration of the issuance to him of all of the capital stock of the corporation [Tr., last par. on p. 70 and first five lines on p. 71];

(j) this corporation was not the corporation mentioned in the contract between plaintiffs and defendants. [Tr. p. 24, par. 9.]

Upon the basis of the foregoing reasons, the court below ruled that Willis Allen having subsequently received a discharge in bankruptcy had been thereby released from the liability of the judgment.

Appellees believe the ruling was correct, and cite herewith a few of many authorities which uphold the decision:

(a) The Bankruptcy Act states: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as are liabilities for obtaining money or property by false pretenses or false representations . . .

11 U. S. C. A. 35, Chap. III, Sec. 17.

(b) By express provisions of the Act, there is excepted from the operation of a discharge a liability for obtaining property by false pretenses or false representa-

tions, obligations of this nature surviving the discharge thereunder. For the liability to come within this provision of the Act, it must appear:

(a) that the bankrupt has made false representations,

(b) that these false representations were made with the intention of defrauding the creditor,

(c) that the creditor relied upon and was misled by the false representations,

(d) and that property or money was obtained as a result thereof.

If any one or more of these elements are lacking, the obligation will not survive the discharge in bankruptcy.

8 C. J. S., Bankruptcy, Sec. 573, at pp. 1513, 1514.

(c) "Not all frauds come within this exception to the operation of a discharge. It is only fraud in obtaining property by false pretenses or false representations which prevents the release of the bankrupt from the liability based thereon."

8 C. J. S., Bankruptcy, Sec. 573, p. 1516.

(d) *Zimmerman v. Blount,* 238 Fed. 740, quoting from the syllabus, says: "Though a fraud may be committed in ways other than by false representations and still be actionable, it is only fraud by obtaining property by false pretenses or false representations which prevents the release of the bankrupt from his provable debts under the Bankruptcy Act of July 1, 1898."

(e) Debts Not Affected by Discharge in Bankruptcy. "In order to establish the liability of the bankrupt for such debt, the elements of the transaction must amount

to obtaining property by false pretenses or false representation." 4 Cal. Jur., Bankruptcy, Sec. 32, p. 86.

(f) Obtaining Property as Prerequisite. "The bankrupt must have obtained property for himself, or as agent, or have benefited therefrom, to bring him within the exception. . . . It is essential, of course, that property should have been obtained by the bankrupt as a result of the false representations, either for himself, or as agent for another." 8 C. J. S., Bankruptcy, Sec. 573, p. 1518.

(g) Reason for Rule. "We assume, in the consideration of the question, that Congress intended the language of the statute to be understood in its ordinary signification, and that the purpose of the law was to prevent the bankrupt from retaining the benefits of property acquired by fraudulent means." 8 C. J. S., Bankruptcy, Sec. 573, p. 1518, quoting from *Rudstrom v. Sheridan,* 142 N. W. 313, 122 Minn. 262.

(h) Burden of Proof. The burden of proof that a debt comes within an exception provided by Sec. 17 of the Bankruptcy Act rests upon the creditor. A creditor who would avoid the effect of a discharge in bankruptcy as to a judgment held by him against the bankrupt has the burden of proof that the note or obligation upon which the judgment was taken was an exception to the discharge. 6 Am. Jur., Bankruptcy, Sec. 810 and Sec. 813 (citing *Kreitlein v. Ferger,* 238 U. S. 21, 59 L. Ed. 1184, 35 S. Ct. 685).

(i) Determination of Character of the Judgment Held by Plaintiffs. In ascertaining whether a liability on a judgment was discharged in bankruptcy, the court will

go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and, when necessary, extrinsic evidence will be received for the purpose of determining the character of the debt. *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d 127, 177 P. 2d 364.

"In determining whether the collection of the judgment, indicating that it was based upon fraud and deceit is barred by debtor's discharge in bankruptcy, the language of the original judgment is not controlling as to either party, but the record must be examined to determine the true nature of the acts upon which the judgment was based." *Tudryck v. Mutch* (1948), 30 N. W. 2d 512, 320 Mich. 86.

Appellees have no quarrel with any of the law enunciated in the cases cited by appellants in their opening brief herein. But, contrary to the impression which appellants have labored to create, the court below did not hold, and the appellees have never contended, that money or property obtained by fraud must be obtained for the bankrupt himself to avoid the rule that a subsequent discharge in bankruptcy will release the debt.

There can be no doubt that if a bankrupt is benefited by reason of money or property which a creditor transfers to a third person at the request of the bankrupt or for the benefit of the bankrupt, the effect is the same as if the money or property had been received by the bankrupt himself.

In re Kunkel, 40 F. 2d 563, cited by appellants, merely holds that Kunkle, acting as agent for other defendants, obtained property for his principal by false and fraudu-

lent representations, and therefore Kunkle's discharge in bankruptcy was no bar to a suit for the recovery of the property. But there is no application of such facts to the case at bar. Willis Allen did not obtain any money or property from the plaintiffs either for himself or as agent for any principal. Immediately after the radio station concession was issued by the Mexican government to Manual Barbachano, Willis Allen demanded that Barbachano turn over the concession to a corporation specified in the contract—a corporation in which Willis Allen's nominees would have owned 80% of the stock. But Barbachano refused, rescinded his contract with defendants, and partially built the radio station out of his own funds on his own property and later transferred the entire station to a Mexican corporation in exchange for all of its capital stock. This was not the corporation contemplated and called for in the contract, but instead was a corporation in which the court found that neither Willis Allen nor any of the defendants ever owned any interest. The transfer was made by Barbachano in furtherance of a plan of his own with which Willis Allen had no connection whatsoever, either as agent or principal or beneficiary.

In *Matter of Dunfee,* 219 N. Y. 188, cited by appellants, a surety company became surety on Dunfee's bond, at his request. Later, when the surety company paid the bond, the effect was the same as if the money had been paid to Dunfee, because the obligation which the surety company paid was Dunfee's obligation. Naturally, such an obligation was not cancelled by Dunfee's discharge in bankruptcy; it was proven that Dunfee had made false

representations as to his financial standing in obtaining the bond.

But in the case at bar, appellants have not paid off any obligation for the benefit of appellees.

In *Gaddy v. Witt,* 142 S. W. 926, cited by appellants, Witt was induced by false representations to become a guarantor of J. Homer Gaddy's indebtedness to a bank. J. Homer Gaddy defaulted and attempted to discharge his obligation by bankruptcy. But it was held that Witt having paid J. Homer Gaddy's indebtedness to the bank could still maintain his action against Gaddy because Witt's signature to the guaranty was obtained by fraud.

But in the case at bar, the sums paid out by the plaintiffs to build the radio station were not paid out for the benefit of Willis Allen, nor were they paid at his request, with the exception of $1700 paid by Manuel Barbachano to the Mexican government for the issuance of the concession and this sum was paid by Barbachano out of money supplied by Willis Allen and the other defendants for that purpose. All of the remaining sums paid out by the plaintiffs for the construction of the station were paid out for the construction of the radio station for their own account, not for the account or benefit of the defendants.

In the remaining three cases cited by appellants on this point, *Hyland v. Fink,* 178 N. Y. Supp. 114; *In re Aldridge,* 168 Fed. 83; *Fidelity & Deposit v. Arenz,* 290 U. S. 66, the ruling was the same, for the same reasons as in the three cases above reviewed, so there is no point in taking up these cases individually. None of these cases bolster appellants' objections to the ruling in the court below.

(2) Wilful and Malicious Injuries to Person or Property of Another.

(a) A Question of Law Which Was Not Presented to nor Passed Upon by the Trial Court Cannot Be Raised Upon Appeal.

In the court below, no mention was ever made by the pleadings, by counsel for either side, or by the Court, of wilful and malicious injuries to person or property. That point of law is raised in this appellate court for the first time.

The one and only question which is involved on this appeal which was presented to and ruled upon by the court below is the following: Does the discharge in bankruptcy of defendant Willis Allen operate to release said bankrupt from the debt of a judgment for damages for fraud where it was shown that the bankrupt, whether acting for himself or on behalf of or as agent for another, had never at any time obtained any money or property from the judgment creditor for himself or for a third person and where it was also shown that neither the bankrupt nor any of the other defendants had benefited in any way either directly or indirectly from any of the expenditures made by the judgment creditors?

No other point of law was raised below, and plaintiffs themselves framed that single issue by their own pleadings on their motion.

Plaintiffs' pleadings in the court below, on the motion, consisted of the notice of motion, the affidavits of Leonard Horwin, Cleveland B. Swift, William B. Rabow, and of plaintiffs' Memorandum of Points and Authorities.

Horwin's affidavit recites:

> "On or about October 18, 1941, the Court, by the Honorable Harry Holzer, deceased, entered judgment herein against the defendants, including judgment for *damages for their fraud* in the sum of $86,210.42. . . ." (Emphasis added.) [Tr. p. 112.]

Further along in the same affidavit we find:

> "That notwithstanding the bankruptcy of Willis Allen in 1943 and in accordance with the law applicable thereto, said Willis Allen continues liable along with the other defendants for the judgment herein, *which is for fraud;* . . ." (Emphasis added.) [Tr. p. 115.]

Plaintiffs' Memorandum of Points and Authorities, paragraph 6, recites:

> "Enforcement of *judgment in damages for fraud* is not barred by bankruptcy of the judgment debtor, and filing proof of claim in bankruptcy proceedings is not waiver of *claim for fraud.*" (Emphasis added.) [Tr. p. 127.]

Nowhere in plaintiffs' pleadings is there any mention or claim that plaintiffs' judgment was for anything but damages for fraud.

There was absolutely no issue or point of law raised in the court below to claim that a portion of the judgment was not for fraud but instead was for wilful and malicious injuries to person or property and therefore survived bankruptcy.

This Honorable Court has consistently followed its own rule that issues or questions not raised in or presented to the trial court will not be considered in the reviewing court.

In *Ex parte Keizo Kamiyama,* 44 F. 2d 503, 505 (1930), Justice Wilbur observed:

> "It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court. 3 C. J. 689, sec. 580; Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Rodriguez v. Vivoni, 201 U. S. 371, 26 S. Ct. 475, 50 L. Ed. 792; Huse v. U. S., 222 U. S. 496, 32 S. Ct. 119, 56 L. Ed. 285 . . ."

In *Hecht v. Alfaro,* 10 F. 2d 464 (1926), Justice Gilbert said:

> "We can review only rulings made by the trial court on questions brought to its attention and passed upon by it. Oregon R. & Nav. Co. v. Dumas, 181 Fed. 781, 104 C. C. A. 641; Bort v. E. H. McCutchen & Co., 187 Fed. 798, 109 C. C. A. 558; U. S. v. Nat. City Bank, C. C. A., 281 Fed. 754. These considerations are sufficient to dispose of the case upon the writ of error from this court."

In *Century Furniture Co. v. Bernard's, Inc.,* 82 F. 2d 706, 707 (1936), Justice Haney said:

> "The various questions of law attempted to be raised cannot be considered by us because such legal propositions were not properly raised in the trial court . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them."
>
> *Fleishman Const. Co. v. U. S.,* 270 U. S. 349, 356, 46 S. Ct. 284, 70 E. Ed. 624.

Other cases, from this and other courts, on this same point are:

Parrott Estate Co. v. McLaughlin, 89 F. 2d 188, which holds that the theory on which the case was tried in the lower court should be the theory considered on appeal.

Rees v. Lombard, 21 F. 2d 276, which holds that parties cannot on appeal submit their case on a different theory from that on which it was tried.

Preston v. Sutro Baths, 106 P. 2d 16, 41 Cal. App. 2d 148, holds that questions raised in briefs on appeal, but not presented by pleadings or proof, need not be considered.

Union Oil Co. of Cal. v. Union Sugar Co., 173 P. 2d 700, holds that an appellate court will consider only such points as were raised in the trial court.

Madison v. Octane Oil Co., 154 Cal. 768, 99 Pac. 176, holds:

> "A case will not be reviewed on a theory different from that on which it was tried below."

The following cases have made like holdings: *Maxwell v. Jimeno,* 89 Cal. App. 612, 265 Pac. 885; *Perry v. A. Paladini,* 89 Cal. App. 275, 265 Pac. 580; *Schneider v. Henly,* 61 Cal. App. 758, 215 Pac. 1036; *Furlong v. White,* 51 Cal. App. 265, 196 Pac. 903.

To permit appellants to raise this new point of law on appeal for the first time would be unfair to appellees because it would deprive them of the opportunity of referring to portions of the record not included in the transcript.

Also it would deprive the appellees of the right to introduce extrinsic evidence in accordance with the rule per-

mitting such evidence as laid down in *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d 127, 177 P. 2d 364.

And last, but not least, if appellants were permitted to raise for the first time on appeal a question of law not presented to nor passed upon by the trial court, it would be not only unfair to the appellees, but also it would be unfair to the appellate court and to the trial court, for several obvious reasons.

(b) Appellants' Newly Raised Point Is Without Merit.

Appellees submit that the above mentioned considerations should dispose of this point. However, even so, appellants' newly raised point has no merit. A close inspection of the Transcript shows clearly that the $15,150 portion of the judgment which appellants are now belatedly claiming was an award for slander of title, is not that at all, but actually is instead a carefully and meticulously calculated award of damages for loss of radio broadcast advertising time [Tr. p. 74, last paragraph, extending down to the middle of p. 75; and also p. 87, last line thereof].

And the $10,000 portion of the judgment which appellants for the first time on this appeal claim to be an award for injury to personal property, to-wit, to the radio station equipment which was said to be wrongfully attached, upon closer inspection turns out to be merely an award of special damages awarded to plaintiffs, not to compensate them as claimed for wilful and malicious injury to the radio equipment which was attached, but instead was awarded to plaintiffs to compensate them for "a loss in the additional sum of $10,000 expended by the latter, as aforementioned, in order to procure the reinstatement of

said concession after the Mexican government had declared the same to have become void and terminated:" . . . because of delay in station construction occasioned by the attachment. There was no actual physical damage or injury to the attached radio equipment while it was in the custody of the deputy United States marshal, nor was there any allowance of damages therefore [Tr. p. 76, first paragraph commencing on that page; also p. 84, first 12 lines].

Neither of the foregoing portions of the damages awarded to appellants come within the exceptions specified by the statute, hence they were released by the discharge in bankruptcy. (11 U. S. C. A. 35, Chap. III, Sec. 17.)

It is abundantly clear that no award of ordinary damages for the wrongful attachment was made, for the following reason: The proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention. This measure of damages is stated in one of the leading cases on this subject in California, in *Atlas Dev. Co. v. Nat. Surety Co.,* 190 Cal. 329, 212 Pac. 196. The amount of such ordinary damage was manifestly negligible, and no award therefor was made by the court. But in response to plaintiffs' prayer for special damages which were specially pleaded, $10,000 was awarded to compensate plaintiffs for their expenditure of that sum of money in reinstating the concession after it had been cancelled by the Mexican government for failure to complete the construction within the time allowed therefore, the delay having been occasioned by the wrongful attachment. [Tr. p. 76, first paragraph commencing on that page; also p. 84, first 12 lines.]

Therefore, it is clear that the $10,000 portion of the judgment referred to by appellants as having been an award of damages for wilful and malicious injuries to person or property, is not that after all, but instead is only an award of special damages arising because of the wrongful attachment.

In passing, however, it may be observed that possibly no award of ordinary damages was made, however small that award might be, for another reason—namely, appellants' own wrong doing in regard to the attachment. While such attachment was in effect, one or more of the appellants was a party to causing the deputy United States marshal and caretaker to become intoxicated, and while he was in such condition the appellants caused the attached radio equipment to be removed and spirited out of the country and across the line into Mexico. For this exploit one or more of the appellants served a term in jail in Los Angeles for contempt of court. These considerations do not appear in the record now before the court, but that is where the trail leads once consideration is undertaken of issues and points not presented in the court below.

IV.

Conclusion.

Appellees respectfully request of this Court that the ruling of the lower court be affirmed.

Respectfully submitted,

LAWRENCE W. ALLEN,

Attorney for Appellees.